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March 15, 2018

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Calhoun Building
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED
MAR 15 2018
SC Court of Appeals

**Re: 3019 Hwy. 25 S. LLC d/b/a 25 Drive-In and Tommy McCutcheon
v. Duke Energy Carolinas, LLC, SCPSC Docket No.: 2017-32-E.**

Dear Ms. Kitchings:

Enclosed for filing please find a Notice of Appeal and Certificate of Service in the above referenced matter. Our check in payment of the \$100 filing fee is also enclosed. Please stamp the extra copy provided and return it with our courier. Should you have any questions, please contact me.

Yours truly,

Frank R. Ellerbe, III

FRE:tch

Enclosures

cc: Public Service Commission of South Carolina (via electronic filing)
Alexander G. Shissias, Esquire (via email & US Mail)
John J. Fantry, Jr., Esquire (via email & US Mail)
Shannon Bowyer Hudson, Counsel, SC ORS (via email & US Mail)
Andrew M. Bateman, Counsel, SC ORS (via email & US Mail)
Heather Shirley Smith, Deputy General Counsel (via email)
Rebecca J. Duliin, Senior Counsel (via email)

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

DOCKET NO. 2017-32-E

RECEIVED

MAR 15 2018

SC Court of Appeals

3109 Hwy. 25 S. L.L.C. d/b/a 25 Drive-In and
Tommy McCutcheon Respondents,

vs.

Duke Energy Carolinas, LLC Appellant.

NOTICE OF APPEAL

Duke Energy Carolinas, LLC (“DEC”) in Docket Number 2017-32-E before the Public Service Commission of South Carolina (“Commission”) hereby appeals Commission Orders 2017-774 dated December 21, 2017 and 2018-101 dated February 13, 2018. Order Number 2017-774 is attached as **Exhibit 1**. DEC petitioned for rehearing and/or reconsideration of the Order on January 2, 2018. The Commission denied the petition for rehearing and/or reconsideration by Order No. 2018-101 on February 13, 2018. The Order is attached as **Exhibit 2**. DEC received written notice of the entry of Order 2018-101 on February 14, 2018.

Dated this 15th day of March, 2018.

[SIGNATURES FOLLOW ON NEXT PAGE]

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EXHIBIT 1

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2017-32-E - ORDER NO. 2017-774

DECEMBER 21, 2017

IN RE: 3109 Hwy. 25 S., L.L.C. d/b/a 25 Drive-In)	ORDER GRANTING
and Tommy McCutcheon,)	RELIEF
Complainant/Petitioner v. Duke Energy)	
Carolinas, LLC, Defendant/Respondent)	

This matter comes before the Public Service Commission of South Carolina ("Commission") on the Complaint of Tommy McCutcheon ("McCutcheon" or "Complainant"), owner of 3109 Hwy. 25 S., L.L.C. d/b/a 25 Drive-In, against Duke Energy Carolinas, LLC ("Duke" or "DEC"), asserting that DEC wrongfully transferred McCutcheon off the Greenwood Rate.

A hearing was held in this matter on April 5, 2017, and April 19, 2017. Complainant was represented by Alexander G. Shissias and John J. Fantry, Jr., of The Shissias Law Firm, L.L.C. DEC was represented by Rebecca J. Dulin, Esquire, Senior Counsel for DEC, and Frank R. Ellerbe, III of Sowell, Gray, Robinson, Stepp & Laffitte, LLC. The Office of Regulatory Staff ("ORS") was represented by Jeffery M. Nelson, Esquire. In support of the Complaint, the Complainant presented testimony from Tommy McCutcheon, Carolyn McCutcheon, and James R. Calhoun and Exhibits that were marked Hearing Exhibits 1 through 4. DEC presented testimony from Douglas T. Fowler, Jesse Gonzalez, Theo Lane, and Joel Lunsford and Hearing Exhibits 5 through 9. The ORS presented testimony from April Sharpe.

On January 27 of 2017, the Commission received a Complaint from Mr. Tommy McCutcheon regarding the revocation of his access to the Greenwood Rate by Duke Energy Carolinas, LLC. More specifically, McCutcheon's business entity, a drive-in movie theater in Greenwood, known as 3109 Hwy. 25 S., L.L.C. d/b/a 25 Drive-In, was removed by Duke Energy from the Greenwood Rate in June of 2015. The current action arises out of a series of events taking place at the theater and/or related to its electric service between May 30, 2015, and June 18, 2015.

The theater was built in the 1940's and purchased by McCutcheon in 2008, at which time it had not been in operation in 25 years. After the purchase and during subsequent operation, McCutcheon added, among other things, modern cooking equipment and new projection screens - one in 2008 and one in 2016 - in addition to the single original screen.

The theater was, until June of 2015, subject to the Greenwood Rate. The Greenwood Rate is a product of Act No. 1293 of 1966. The Act approved a negotiated contract for the purchase of the Greenwood County Electric Power Commission's facilities by Duke Power Company – the predecessor to Duke Energy Carolinas, LLC. One of the provisions of the Act was that existing electrical connections at the time of the sale were to be charged the lower of the then-current rate being charged by Greenwood, or the Duke rate. At the time, it was anticipated that electric prices would be going down, and Greenwood customers would eventually be migrated to the Duke rate. This expectation proved to be dramatically incorrect. As a result, there are a number of customers – about 2,540 – that continue to be on the Greenwood Rate. Because it is now substantially lower

than the regular Duke Rate, the Complainant has an interest in retaining access to the Greenwood Rate.

The Complainant was removed from the Greenwood rate in June of 2015 due to certain events. It is uncontested that, on Saturday, May 30, 2015, the theater experienced a power outage during which a very bright spark and burned cable were observed. The cable, in this case, was the service wire that connects the theater facility to the pole-mounted transformer. A Duke Energy crew was able to repair the damage and enabled the theater to continue operations that night. It is also uncontested that two weeks later, on Saturday, June 13, 2015, there was a second power outage. During this second outage, it was observed that the coating had melted off the service wire, and it was smoking. Once again, a Duke Energy crew repaired the line, enabling the theater to continue showing films for the rest of the night.

Following the second outage, the Duke Construction and Maintenance Supervisor for the area, Tommy Fowler, visited the theater and inspected the facilities. He determined that the existing facilities were insufficient to handle the load demand of the theater and that the electrical facilities serving the theater needed to be upgraded. The record shows that the fuse on the primary side of the pole-mounted transformer melted. This is indicative of excess current flow, which would result in a thermal overload. In this case, we have uncontested testimony that the service line providing power to the theater was a single 2/0-3 aluminum triplex wire, which has a carrying capacity of 185 amperes. As the melted fuse and wire were indicators of thermal overload, Duke Energy determined a replacement of the facilities serving the theater was necessary. The Company replaced the single 2/0

aluminum triplex wire with two 4/0 triplex wires, with a load capacity far above the originally installed service wires. At this time, Duke also replaced the 25 KVA pole-mounted transformer with a 50 KVA transformer and replaced the current transformers and metering equipment at the facility. Testimony was presented that, using data gathered following the repairs, improvements, and reconnection of the facility, demand of the theater was calculated to be 225 amperes, or about 122% of the rating of the line¹. Pursuant to these modifications and its existing policy, Duke Energy removed the Complainant from the Greenwood Rate.

On June 13, 2015, however, Duke Energy's installed equipment did not meter the load being carried over the service line, but merely the amount of energy that had been used in kilowatt-hours, which is not necessarily indicative of peak load. The calculation of 225 amps drawn by the theater resulted from the readings taken from the new metering equipment installed as upgrades to the existing facilities. The load information, though, was not available at the time of the outages. It would seem that, particularly in the case of a sophisticated commercial establishment, measures would be taken by the operator – here, the Complainant – to ensure compliance within the limits of the Greenwood Rate. In fact, we were presented with testimony that supports that supposition: equipment was chosen for upgrades to the theater which were energy efficient and would operate on single-phase power.²

¹ Lunsford Direct Tr. at p. 238

² T. McCutcheon Direct Tr. at p. 18

Clearly, it is a critical matter for the utilities to ensure safe, reliable delivery of power to its customers. In this case, a smoked-damaged building with burning cables had been reported. That problem required resolution in a timely fashion, and it was resolved. However, it remains important to provide information to customers and arrive at a safe and economical solution to the problem. There must be a balancing of interests. It would not be appropriate to punish Duke for taking action to safely provide power in what was an unsafe situation. However, it would not be appropriate to have the Complainant -- operating for a number of years in apparent compliance with the Greenwood Rate, and taking measures to ensure compliance with the Rate -- to be removed from the rate without specific proof that they had become non-compliant with the rate. Nevertheless, now that the facilities serving the theater have been greatly upgraded, it would not seem reasonable to give the theater access at the Greenwood Rate to capacity significantly greater than that which it would have access to under the original facilities serving the premises.

The balancing of the interests of the parties results in this Commission allowing the Complainant to have an opportunity to return to the Greenwood Rate, with some limitations.

IT IS THEREFORE ORDERED THAT:

1. There is to be no allowance for recovery for the difference in the normal Duke Rate and the Greenwood Rate from the time the theater was removed until the time that the Complainant is placed back on the Greenwood Rate.
2. The Complainant shall not be granted fees or costs as requested.

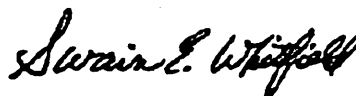
3. The Complainant shall be allowed to continue on the Greenwood Rate only so long as the theater stays within the original limitations of the equipment serving the premises. Thus, if the theater experiences a demand as indicated by metered peak usage corresponding to amperage greater than the original capacity of the service line - 185 Amperes – it shall be proper to remove the Complainant from the Greenwood Rate again, and be placed permanently on the applicable Duke rate. The demand shall be measured in a manner consistent with the demand component measurement of Duke Energy Carolinas, LLC's commercial customers that are subscribed to a demand rate schedule. Accordingly, demand shall be measured using rolling 30-minute intervals, with the demand being calculated as the highest 30-minute average demand during each billing period.

4. Duke Energy Carolinas, LLC shall provide electric metering information sufficient for the Complainant to determine peak electric usage.

5. All relief herein granted shall take effect in the first billing cycle after January 1, 2018, unless the Complainant communicates to the Commission and the Company that he would like more time to come into compliance with the conditions of our ruling before re-entering the Greenwood Rate.

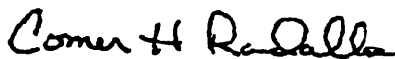
6. This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:



Swain E. Whitfield, Chairman

ATTEST:



Comer H. Randall, Vice Chairman

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2017-32-E - ORDER NO. 2018-101
FEBRUARY 13, 2018

IN RE: 3109 Hwy. 25 S., L.L.C. d/b/a 25 Drive-In and Tommy McCutcheon, Complainant/Petitioner v. Duke Energy Carolinas, LLC, Defendant/Respondent))))	ORDER DENYING REQUEST FOR RECONSIDERATION OR REHEARING
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This matter comes before the Public Service Commission of South Carolina ("Commission") pursuant to S.C. Code Ann. Section 58-27-2150 and 10 S.C. Code Ann. Regs. 103-825(A)(4), and applicable South Carolina law. Respondent Duke Energy Carolinas, LLC ("DEC" or the "Company") petitioned the Public Service Commission of South Carolina ("Commission") to rehear or reconsider its grant of relief in Order No. 2017-774. A hearing was held in this matter on April 5, 2017, and April 19, 2017, and the Commission served its Order on DEC on December 21, 2017. This Petition was filed January 2, 2018, with the Complainant responding in opposition to the Petition on January 5, 2018.

The Petition states that the factual findings of the Commission in Order No. 2017-774 do not provide a basis for the relief granted, but that is not the case. The Petition mischaracterizes our Order as requiring DEC to place the Complainant back on the Greenwood Rate "unless and until the demand of the Complainant's business exceeds the capacity of the facilities that were replaced in June 2015." However, the Commission Order requires that the Complainant be given access to the Greenwood Rate as long as he stays

within the original limitations of the equipment that was installed to serve the premises, which was in place at the time of Act 1293 of 1966, and the subsequent purchase of Greenwood County Electric Power Commission by Duke (at the time, Duke Power Company). We are limiting, in effect, the ability of the Complainant to exceed the facility capacity equal to the facility capacity available over 50 years ago at the site, unless the Complainant migrates off the Greenwood Rate. As a practical matter, this may be more restrictive than the previously unmonitored limitation, which used the electrical delivery facility's physical limits as its only load restriction.

The Commission's ruling, which is specific to the facts of this case, does not unjustly enrich the Complainant, nor unduly penalize the Respondent. It merely affords an active participant on the Greenwood Rate an opportunity to comply with the facility limitations that he had been unaware might have been strained. The Commission did not have testimony to support the position that the demand load was the same after installation of the new facilities as before. It is questionable whether the Commission could have been presented with credible testimony to that effect, since the demand load was not being measured or reported.

Additionally, Order No. 2017-774 is neither inconsistent with the *Payne v. Duke Power Co.*, 304 S.C. 447, 405 S.E.2d 399 (1991) Supreme Court Opinion, nor does it go further than to clarify, as applied to the facts and circumstances of this case, the Commission's own rulings from 1966 forward. DEC's Petition characterizes Act 1293, *Payne*, and prior Commission rulings as requiring that a change in a customer's needs that requires a change in the facilities used by the Company to provide service to that customer

means the customer is no longer eligible for the Greenwood Rate. We note that Act 1293 does not enumerate what constitutes a change in character of a connection, nor how such a change may originate. The Supreme Court's decision in *Payne* does not provide an exhaustive list of what is and is not considered a "change in character" of the connection. However, to the extent that a customer changes his service from single- to three-phase, or from a residential to commercial operation (or likewise the reverse of each), then the Court has spoken to the change of applicability of the Greenwood Rate.¹ We decline to address an expansion, contraction, or modification of previously established principles and interpretations of what constitutes a change in the character (or type) of the connection in this instance. Here, the Commission found an inadequacy of information available to make a determination as to whether such a change in character occurred. Such a finding is not a departure from prior interpretation of Act 1293 nor does it differ from the longstanding prior practice as recognized by the Court and the Commission.

The Commission agrees, as DEC points out, that Act 1293 does not provide an opportunity to re-qualify for the Greenwood Rate.² Nor has the Commission provided such an opportunity. Rather, the Commission simply concluded that inadequate information was available to determine that a change in character was necessitated in this case due solely to the actions of the Complainant.

¹ "[W]e agree with the trial court that a change in either the character of the connection (e.g. from single to three phase) or use of the premises (e.g. from **402 residential to commercial) constitutes a new connection effectuating a transfer to Duke rates." *Payne v. Duke Power Co.*, 304 S.C. 447 (1991)

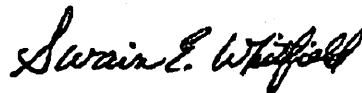
² "[The] PSC, the agency charged with administering Act 1293, has, without exception, construed it as establishing a closed rate schedule, that is, one precluding retransfer of customers." *Payne v. Duke Power Co.*, 304 S.C. 447 (1991)

The Commission has struck an appropriate balance between the needs of the utility to provide safe, reliable, and economic power, and the concerns of the consumer to make informed and self-determinative actions to exercise its rights under its approved electric tariff.

For these reasons the Commission denies the Petition for Rehearing or Reconsideration.

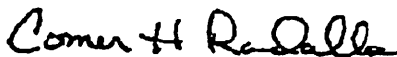
This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:



Swain E. Whitfield, Chairman

ATTEST:



Comer H. Randall, Vice Chairman

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA**

DOCKET NO. 2017-32-E

Duke Energy Carolinas, LLCAppellant,

vs.

3109 Hwy. 25 S. L.L.C. d/b/a 25 Drive-In and
Tommy McCutcheon Respondents.

PROOF OF SERVICE

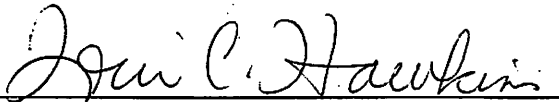
This is to certify that I, Toni C. Hawkins, a Paralegal with the law firm of Sowell Gray Robinson Stepp & Laffitte, LLC, have this day caused to be served upon the person(s) named below the **Notice of Appeal on behalf of Duke Energy Carolinas, LLC** in the foregoing matter by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

Alexander G. Shissias, Esquire
John J. Fantry Jr., Esquire
The Shissias Law Firm, LLC
1727 Hampton Street
Columbia, South Carolina 29201

Public Service Commission of South Carolina
101 Executive Center Dr., Suite 100
Columbia, South Carolina 29210

Shannon Bowyer Hudson, Counsel
Andrew M. Bateman, Counsel
SC Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, South Carolina 29201

Dated this 15th day of March, 2018.


Toni C. Hawkins